

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PARIS CLOUD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 02-1316-SLR
	)	
AMQUIP CORPORATION,	)	
	)	
Defendant.	)	

**MEMORANDUM ORDER**

**I. INTRODUCTION**

Plaintiff initially filed suit against defendant and others on January 7, 2000 in Harris County, Texas. (D.I. 13, ¶ 9) The suit alleged that negligence on the part of defendant caused plaintiff's injuries. (Id. at Ex. B) Defendant filed a special appearance motion on or about February 4, 2000. (Id. at ¶¶ 12, 13) The trial court in Texas denied the motion, but it was upheld by the Court of Appeals for the First District of Texas on February 7, 2002. (Id. at ¶¶ 14, 18) Plaintiff filed his original complaint in this court on July 24, 2002. (Id. at ¶ 19) Currently before the court is defendant's motion to dismiss plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(6) ("Rule 12(b)(6)". (D.I. 12)

For the reasons that follow, the court shall deny defendant's motion.

## **II. BACKGROUND**

On February 24, 1999, plaintiff was injured on a job site accident in Delaware City, Delaware. (D.I. 12 at 4) Plaintiff alleges that an employee of defendant improperly operated a forklift causing plaintiff to be injured during the disassembly of a crane. (Id.) Plaintiff seeks compensation for medical expenses, loss of earning capacity, and other damages. (Id., Ex. A at 3-4)

## **III. STANDARD OF REVIEW**

In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson,

355 U.S. 41, 45-46 (1957). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

#### IV. DISCUSSION

Defendant argues that plaintiff's claim is time barred as his injury was sustained on February 24, 1999 and suit had to have been brought prior to February 24, 2001.<sup>1</sup> (D.I. 12 at 5-6) Plaintiff counters that Delaware's Savings Statute, 10 Del.C. § 8118<sup>2</sup>, preserves his cause of action. (D.I. 13) Defendant

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<sup>1</sup> Delaware's applicable statute of limitations is two years. 10 Del.C. § 8119. The court acknowledges that while generally, a statute of limitations defense cannot be used in the context of a Rule 12(b)(6) motion, an exception can be made when the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleadings. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994).

<sup>2</sup> If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or

claims that the Savings Statute is inapplicable here because plaintiff originally filed suit in Texas and the statute does not apply to foreign-filed claims. (D.I. 12 at 6-7)

Defendant relies on Sorensen v. Overland Corp., 142 F. Supp. 354 (D. Del. 1956) for the proposition that Delaware's Savings Statute "does not encompass prior actions arising out of foreign courts." Id. at 363. That reasoning was only one of several grounds for dismissal in that case and this court declines to follow that court's logic.

Delaware state courts that have spoken directly to the issue of whether the Delaware Savings Statute applies to actions commenced beyond the boundaries of the State have concluded that it does. In Leavy v. Saunders, 319 A.2d 44 (Del. Super. Ct. 1974), the court held that "the language of § [8118] does not show an intention to limit the section solely to successive actions brought in the courts of this State," because it "is silent as to place of commencement." Id. at 47. The court in Leavy reasoned that "the real function of a statute of limitation[s] is to protect prospective litigants against stale claims." Id. The court concluded that it would be "difficult to justify the conclusion that this exception to the statute of

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after the reversal of the judgment therein.  
10 Del.C. § 8118(a).

limitations should be applied on the basis of judicial jurisdiction or territory.” Id.

Defendant also relies on Morris v. Wise, 293 P.2d 547 (Okla. 1955) to support its claim that savings statutes do not apply to causes of action initially brought in a foreign jurisdiction. Id. at 550-51. This reliance is misplaced. Delaware’s statute is different from the Oklahoma statute. The Oklahoma statute specifically limits the applicability of the Oklahoma savings statute to “actions commenced within this state.” 12 O.S. 1951 § 100. Therefore, Morris is inapplicable to the present case.

Additionally, this court finds that the Delaware Supreme Court has held that the purpose of the Delaware Savings Statute is “to mitigate against the harshness of the defense of the statute of limitations raised against a plaintiff who, through no fault of his own, finds his cause technically barred by the lapse of time.” Giles v. Rodolico, 140 A.2d 263, 267 (Del. 1958). In that case, as well as the Leavy case cited above, the cause of action was dismissed because of failure to obtain personal jurisdiction over the defendant. Id.; Leavy, 319 A.2d at 47-48. The present action was brought in this court because of the failure to obtain personal jurisdiction over defendant in a foreign state. (D.I. 13) As in the cases cited above, defendant has been aware of the proceedings and there is no indication

defendant has suffered harm or prejudice by the consecutive filings. See Leavy, 319 A.2d at 48.

## **VI. CONCLUSION**

The court holds that the Delaware Savings Statute applies to actions initially brought in a foreign jurisdiction and dismissed for reasons other than on the merits of the claim. The court finds that plaintiff brought this action against defendant within the one year time period allowed for the initiation of a subsequent suit by the Savings Statute.

Therefore, at Wilmington this 28th day of April, 2003;

IT IS ORDERED that defendant's motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) (D.I. 12) is denied.

Sue L. Robinson  
United States District Judge